COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3279 **Cir. Ct. No. 02CV003480, 02CV000160**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NORMAN C. GREEN, JR.,

PLAINTIFF-APPELLANT,

V.

JON E. LITSCHER, ELLEN K. RAY, SGT. CARPENTER, CAPTAIN LINGER, REV. OVERBO, AND KELLY COON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Norman Green appeals an order dismissing his action against certain prison system employees. We affirm in part, reverse in part and remand.

¶2 Green's complaint and amended complaint alleged several claims against several defendants. The circuit court dismissed the claims against most defendants, but changed venue as to one claim against Gerald Berge. We previously concluded that the order was nonfinal as to Berge for that reason, and we dismissed him as a respondent in this appeal.

¶3 Green's first claim is that defendant Sergeant Carpenter, a corrections officer at the Secure Program Facility, unlawfully interfered with his mail. Green alleged that he composed a letter to state Rep. Scott Walker; that such correspondence is privileged against staff inspection under WIS. ADMIN. CODE § DOC 309.04(3) (Aug. 2001); and that when Green sent this mail to be copied, Carpenter "intercepted" it. Green sought relief under 42 U.S.C. § 1983. The circuit court dismissed the claim for failure to exhaust administrative remedies as required by WIS. STAT. § 801.02(7)(b) (2001-02).[1]

¶4 Green argues that the court erred because he exhausted his administrative remedy by filing a complaint in the Inmate Complaint Review System (ICRS). That complaint was filed in December 2001, and in it Green asserted facts similar to those stated above. It stated that Green put the letter in an envelope and put it in the legal copy pile to make photocopies, but Carpenter read the contents, which he did not have the right to do. Green's complaint asked to have the letter back. The Corrections Complaint Examiner (CCE) rejected the complaint on the ground that a conduct report had been written "regarding the alleged incident;" that Green's ICRS complaint "is challenging the factual basis of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the conduct report or describing mitigating factors to explain the complainant's actions and behavior;" and that the judgment of the fact-finding body such as the adjustment committee must be accepted as to those matters without review in the ICRS. The decision did not identify the conduct report referred to, but it appears to be one in which Green was charged with an offense based on the content of the letter, of which he was found guilty.

¶5 Carpenter argues on appeal that, to exhaust administrative remedies for Carpenter's allegedly improper inspection of the letter, Green was required to raise the issue in an ICRS complaint from the finding of guilt on the conduct report. We disagree. Green's first ICRS complaint was the proper method, because the finding of guilty or not guilty on the conduct report would give no resolution of whether Carpenter was permitted to seize the letter. The issue in the conduct report was whether Green should be punished for violating a rule due to the content of the letter. That would also be the issue on later administrative review of the committee's decision. But the adjustment committee was *not* required to address whether Carpenter's seizure of the letter was proper, because the prison discipline system does not recognize an exclusionary rule that would have barred the committee from punishing Green if the letter was improperly seized. *See* WIS. ADMIN. CODE § DOC 303.86(2)(a) (Dec. 2000) ("[a]n adjustment committee or a hearing officer may consider any relevant evidence, whether or not it would be admissible in a court of law and whether or not any violation of any state law or any DOC administrative code provision occurred in the process of gathering the evidence").

¶6 In addition, we are not aware that an adjustment committee would be authorized to return the letter to Green, which was the relief he expressly sought in his ICRS complaint. Nor would an adjustment committee be authorized to

discipline Carpenter and reaffirm Green's right to privacy for this type of mail, which seem, at least implicitly, to also be the relief he sought in the ICRS complaint. Accordingly, we conclude that Green properly exhausted his administrative remedy with his ICRS complaint, and filing a second ICRS complaint from the disciplinary proceeding was not necessary to raise these issues. Therefore, we reverse the dismissal of this claim.

¶7 Green next argues that the court erred by dismissing his claim that Carpenter retaliated against him by issuing the conduct report described above, as a response to Green's complaints about the prison system. We agree with the court that Green failed to exhaust his administrative remedy. The ICRS complaint we described above, while it does suggest that Carpenter's reading of the letter was motivated by retaliation, cannot reasonably be read as alleging retaliation by Carpenter *in his writing of the conduct report*. The complaint seeks no relief with respect to the writing of the conduct report.

¶8 Green next argues that the court erred by dismissing his claim that defendant ICE Ellen Ray intentionally impeded his ICRS complaints, including the one described above. Green argues that he exhausted his administrative remedy because he asserted, in his appeal from Ray's decision, that she was impeding the ICRS process by using erroneous analysis. However, that assertion in his appeal does not convert the ICRS complaint into one about Ray intentionally impeding the process. The underlying ICRS complaint was still about Carpenter's seizure of the letter, not about Ray.

¶9 Green's next argument relates to his claim challenging the constitutionality of WIS. ADMIN. CODE § DOC 303.20 (Dec. 2000). As relevant to this case, that rule prohibits gang-related activities. Green's complaint alleged in

paragraph 38 that the rule is overbroad and vague in its continued application to his beliefs. It appears from the allegations that Green is referring to the application of that rule to the "Growth and Development" concept and literature. Green appears to be arguing that the circuit court erred by transferring venue of this claim to Dane County. The defendants respond that venue was properly transferred. However, it appears to us that the circuit court did *not* transfer venue on this claim.

¶10 The circuit court changed venue on a different claim. The order transferring venue states that Green's claim "under 42 U.S.C. § 1983 against defendant Berge challenging the constitutionality of Wis. Admin. Code ch. DOC 310 as applied to the plaintiff is not dismissed, but venue is changed." The significant language there is the reference to the code provision "ch. DOC 310." That language does not transfer any claim about the gang-related rule, which is in ch. 303. The circuit court understood Green's complaint to be alleging that the ICRS, which is contained in ch. 310, provides only "an illusion of a remedy." The court's oral discussion made clear that this was the claim it was transferring, and the written order's reference to ch. 310 is consistent with that discussion. It is not clear whether the court recognized that the complaint also challenges the constitutionality of the gang-related rule, WIS. ADMIN. CODE § DOC 303.20. However, the language elsewhere in the written order has the practical effect of dismissing *all* claims that were not transferred. Accordingly, the real question before us is whether dismissal of this claim was proper.

¶11 We conclude the claim was properly dismissed. If Secretary of Corrections Jon Litscher is the proper defendant for this type of claim, Litscher was properly dismissed for lack of service, as we will discuss further below. It appears likely that Litscher or the Department itself is the proper defendant. *See*

WIS. STAT. § 227.40(1). (The Department itself is not named in Green's suit.) If warden Berge is somehow the proper defendant, then the claim is not before us in this appeal because, as stated above, we dismissed Berge as a respondent in this appeal because the transferred claim against him continues. The dismissal of Green's claim about WIS. ADMIN. CODE § DOC 303.20 could then be brought before us later by an appeal from a final judgment or order on the claim against Berge that remains pending. *See* WIS. STAT. RULE 809.10(4) (appeal brings before us prior nonfinal rulings). We are satisfied that none of the other defendants in this case are proper defendants in a challenge to this rule.

¶12 Green's next argument concerns his claim that he was demoted without due process. This appears to be a reference to paragraph 34 of the complaint, where Green refers to having "launched a well grounded grievance about the retaliatorial [sic] demotions in levels and placement in a more restrictive form of confinement without due process." Green asserts that the circuit court failed to address this claim, and that the record should reflect that this claim remains pending. However, as we stated above, the court clearly dismissed *all* claims that were not transferred, even if it did not individually address the merits of them. Green's brief does not make an argument that such dismissal was erroneous, and therefore we affirm.

¶13 Green next argues that the court improperly dismissed a claim he describes as based on "freedom of conscience" and various federal constitutional provisions. The essence of the claim appears to be that prison staff improperly regard him as being involved in gang-related activities due to his interest in Growth and Development, and have used that perception to "maintain harsh treatment" and his continued placement at this high-security prison. Although the trial court dismissed this claim for failure to exhaust remedies, the defendants do

not make that argument on appeal. Instead, they argue that Green fails to state a claim. They argue that his claim is essentially about correcting prison records, and because inmates can challenge the accuracy of a record through the ICRS, no due process claim is possible. Green replies that his claim is not about correction of the records, but is directed at what he claims is intentional inaccuracy and use of false of information. However, we conclude that Green has not sufficiently explained how such intentional inaccuracy gives rise to a constitutional claim.

¶14 Green next argues that the court erred by dismissing his claim for illegal confiscation of legal documents. Green argues that he exhausted his administrative remedy by attempting to file an ICRS complaint, but the complaint was rejected by the ICE under the rule limiting inmates to two complaints per week. WIS. ADMIN. CODE § DOC 310.09(6) (Apr. 1981). The defendants argue that this attempt failed to exhaust his remedy because it was not in compliance with the rules established for administrative complaints. We agree.

¶15 Green next argues that the court erred by dismissing the third claim in his amended complaint. That claim was titled: "Discrimination, Persecution/Harassment and Denial of Spiritual and Political Cultural and Hertiage [sic] Beliefs." The factual allegations describe Green's efforts to gain permission to possess material and symbols related to Growth and Development, and the manner in which he claims his requests were blocked by defendants Litscher, Berge, Overbo (the prison chaplain), and Captain Linjer.

¶16 To the extent the claims are against Litscher, they were properly dismissed for failure of service, as discussed below. To the extent the claims are against Berge, they are not before us in this appeal, but might be appealable later, as we discussed above in paragraph 11.

¶17 As to the remaining defendants, we turn to their arguments that Green failed to exhaust his administrative remedies. There are two ICRS complaints that Green claims exhausted his remedies. One of those is SMCI-2002-11397. The defendants argue that this complaint was against only Litscher and Berge. We disagree. The complaint does not allege conduct by those specific individuals, but instead asserts that "SMCI & DOC refuse to allow me to possess literature and study and express my beliefs."

¶18 The defendants also argue that this complaint did not exhaust Green's remedies because the final administrative decision on the complaint was issued *after* Green commenced this action, and WIS. STAT. § 801.02(7)(b) provides that a prisoner may not "commence" a suit until his remedies are exhausted. Green responds by pointing out that while it is true his original circuit court complaint was filed before the final administrative decision, this particular claim was not raised in that complaint, and was not commenced in circuit court until the filing of his amended complaint, which came after the final administrative decision. Green's description of the chronology is accurate. The defendants appear to argue that to comply with § 801.02(7)(b), Green was required to commence a new suit, rather than amend his existing complaint to allege a new claim. They cite no authority for that argument, and we reject it. We see no reason why ordinary rules of pleading, which allow amendment of complaints to allege additional claims, should not apply here. Judicial economy is far better served by having this related claim brought into this case, rather than being filed as a separate suit.

¶19 Although the parties also address complaint SMCI-2002-11670, it does not appear necessary to resolve those arguments. That complaint was filed the same day as the above complaint, and makes similar allegations. It does not

appear that both complaints were necessary to exhaust Green's remedies. Therefore, we conclude that Green exhausted his remedies, and we reverse the dismissal of the third claim in Green's amended complaint.

¶20 Green next argues that the trial court committed various improper acts in the course of the litigation. There is no merit to these arguments.

¶21 Finally, Green argues that service of the complaint on Litscher by mail was sufficient to satisfy "the essential intent" of the service statutes, WIS. STAT. §§ 801.10(4) and 801.11, and give Litscher notice of the action. However, Green appears to concede that service was not made in compliance with the statute, and therefore we affirm.

¶22 In summary, we reverse the dismissal of Green's claim that defendant Carpenter interfered with his mail, and the dismissal of Green's claim that defendants Overbo and Linjer acted improperly as to his requests to possess certain items. We affirm the dismissal of the other claims.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.